In the Supreme Court of the United States.

OCTOBER TERM, 1895.

THE UNITED STATES, APPELLANT,
v.
WONG KIM ARK, RESPONDENT,
No. 904.

BRIEF ON BEHALF OF THE APPELLANT.

THE CASE.

This is an appeal from the district court of the United States for the northern district of California, and is taken from the judgment of that court, discharging the respondent on *habeas corpus cum causa* from the custody of the collector of port of San Francisco, who refused to permit the respondent to land in the United States for the reason that he is a Chinese laborer and within the inhibitory provisions of the Chinese exclusion act. The respondent claimed exemption from that act upon the ground that he was born within the United States, and thereby became *ipso facto* a citizen thereof. The Government, while conceding the fact of birth, denied the con-

clusion of citizenship in that respect, contending that as the respondent was born of *alien parents*, to wit, subjects of the Emperor of China, he was at his birth a subject of China, claimed by that nation to be such, and therefore was not when born "subject to the jurisdiction" of the United States within the meaning and intent of the Constitution.

The district court, following as being *stare decisis* the ruling of Mr. Justice Field in the case of Look Tin Sing (10 Sawyer, 358), sustained the claim of the respondent, held him to be a citizen by birth, and permitted him to land. The question presented by this appeal may be thus stated: *Is a person born within the United States of alien parents domiciled therein a citizen thereof by the fact of his birth?* The appellant maintains the negative, and in that behalf assigns as error the ruling of the district court that the respondent is a natural-born citizen, and on that ground holding him exempt from the provisions of the Chinese exclusion act and permitting him to land.

THE LAW.

We are aware that it is generally supposed to be the law that a person born within the United States is *ipso facto* a citizen thereof, irrespective of the nationality of his parents; but that doctrine never did have any justification, and is not sustained by any principle of international or constitutional law. It apparently originated in a misunderstanding of the nature and province of the English common-law rule that birth within the allegiance of the King made the person a subject, even though he

were born of alien parents, and was applied by our people more as a traditionary dogma than as a rule of law. For that reason the doctrine has escaped investigation or examination of the higher judicial tribunals of the land, and thus has a very dangerous error been perpetuated by acquiescence and repetition.

In this connection the remarks of Lord Chief Justice Denman in the case of *Queen* v. *O'Connell* (11 Clark & Fin., 372) are very pertinent. He there delivered the prevailing opinion of the court, overruling the judges of the law courts on what by common consent was deemed to be the law. He said:

> I am tempted to take this opportunity of observing that a large portion of that legal opinion which has passed current for law falls within the description of "law taken for granted." If a statistical table of legal propositions should be drawn out, and the first column headed "Law by statute," and the second "Law by decision," a third column under the heading of "Law taken for granted" would comprise as much as both the others combined. But when in the pursuit of truth we are obliged to investigate the grounds of the law it is plain, and has often been proved by recent experience, that the mere statement of a doctrine—the mere repetition of the *cantilena* of lawyers—can not make it law unless it can be traced to some competent authority and if it be irreconcilable to some clear legal principle.

We proceed to the argument of the great question presented by this appeal: Citizenship under a republican form of government appertains to political sovereignty, and therein essentially differs from the status of "subject" in a monarchical form of government. In the

latter, the subject owes allegiance to the king and not the nation—*ligeantia est vinculum fidei*, a personal relation of feudal origin, traceable to the theoretical divine right to rule, asserted by kings as the source and justification of their sovereignty. The king therefore became *parens patriæ*, the government was paternal, and in return the "subject" owed allegiance of a personal and domestic nature. It was *that* allegiance which constituted the basis of the quasi-political relation of king and subject (*Eyre* v. *Countess of Shaftsbury*, 2 P. Wms., 124), and not the doctrine of nationality. This is what is meant by writers on international law when they say that the status of subject in Great Britian "rests upon the somewhat peculiar conception of allegiance." (Walker on the Science of Int. Law, 205.)

In other words, instead of the allegiance arising from the *status* the latter is made to arise from it, and thus we find in the common law the meaningless doctrine that an alien while within the kingdom is a subject of the King (Kelynage, 38), on the theory that the latter affords him protection, and that on the same theory the child of such an alien becomes a natural-born subject. We say such a doctrine is meaningless, because it entirely ignores and is wholly at variance with the principle of nationality.

True, it is consistent with the "peculiar conception of allegiance" above referred to, and as defined by Blackstone, chapter 10, book 1, where he says: "Allegiance is the tie, or *ligamen*, which binds the subject to the king, in return for that protection which the king affords the subject," but such a doctrine as that, applying as it

does with equal reason and with equal force to aliens within the realm as well as to their children born there, is entirely foreign to the fundamental idea of a political status expressive of nationality; and when we consider the fact that the monarchical dogma of allegiance is at the basis of the doctrine, its total unfitness to govern the question of citizenship in a republic becomes convincingly manifest. "According to the English common law, nationality depended in all cases upon the place of a man's birth, following the feudal principle, which to a certain extent regarded all inhabitants of the soil as appendages to it." (Foote on Int. Jur., 1; Walker on Public Int. Law, 41; Hall on Int. Law, sec. 48; Walker on Int. Law, 205; Lawrence's Wheaton on Int. Law, p. 893.)

These authorities affirm the feudal origin of the common-law doctrine that birth within the *allegiance* of the King makes the person a natural-born subject, and thus prove its principle to be incompatible with the constitution of a republican form of government. Allegiance within the meaning of the common law was a duty imposed upon all persons, aliens as well as subjects. In the one case it was termed *local* and in the other *natural*. It operated to make everyone within the realm a subject of the King, but ceased to operate as to aliens when they departed the realm.

The alien father owing local allegiance, his child born on British soil was deemed to be born within *that allegiance*, and therefore a natural-born subject of the King. The same rule applied where the father had never been within the Kingdom; in that case the local allegiance of the mother was deemed sufficient. Thus the feudal idea of

allegiance dominated the common law and the monarchical principle of fealty to the King was of controlling force. These views are fully supported by the celebrated case of *Calvin*, reported in volume 7 of Lord Coke's Reports, of which case it is said in a note to 1 Hallam's Constitutional History of England, page 418:

> It may be observed that the high-flying creed of prerogative mingled itself intimately with this question of naturalization which was much argued on the monarchical principle of personal allegiance to the sovereign as opposed to the half-republican theory that lurked in the contrary proposition.

It must be very apparent that the common law doctrine is essentially and peculiarly feudal and monarchical, and therefore foreign to republican institutions, where the sovereignty of the State resides in the people and each citizen is a component part of that sovereignty. It must be equally apparent that the common law doctrine could never be the basis of a general principle of international law, for it totally disregards the status of nationality, and accordingly a reference to the *jus gentium* will prove its principle to be fundamentally opposed to the doctrine of the common law, which after all is but a municipal system of jurisprudence.

Speaking of these opposing rules, Westlake, in his work on international law, at page 323, says:

> Unfortunately those rules are far from being the same in all countries. They result almost everywhere from a conflict between the feudal principle of allegiance determined by birth on the soil and the Roman principle of citizenship determined by descent.

Clearly the Roman principle must be the correct one, and it is now the prevailing law; its logic is unassailable, its policy the soundest and most salutary. Unlike the common law, it deals with the status of nationality, and not with the fealty or allegiance to a king. Unlike the common law, it is of universal application to all forms of government, and has none of the *indicia* of monarchy. Unlike the common law, it is in conformity with the eternal fitness of things and best accords with the teachings of political science and an exalted statesmanship; and unlike the common law, it best promotes the interests, the welfare of the American Commonwealth. It is declared to be the true principle by all the authorities on international law. Dr. Bar says:

> To what nation a person belongs is by the law of nations closely dependent on descent. It is almost an universal rule that the citizenship of the parents determines it—that of the father where the children are lawful, and where they are not, that of the mother, without regard to the place of their birth; and that must necessarily be recognized as the correct canon, since nationality is in its essence dependent on descent. Foundlings must of course constitute an exception to this rule; they belong to the State in which they are found. (Bar on International Law, sec. 31; Vattel on the Law of Nations, sec. 212; Savigny on International Law, sec. 351; Field's International Code, sec. 183.)

In the evolution of government it was discovered that the common-law rule and its characteristic theory of perpetual allegiance—the logical consequence of feudalism—was unfitted and unsuited to modern civilization, and

especially did we of the United States solemnly repudiate it as being "inconsistent with the fundamental principles of the Republic." (Rev. Stat., sec. 1999.) In thus rejecting the natural and distinguishing attribute of the common-law doctrine, to wit, that of personal allegiance, we necessarily rejected the entire doctrine itself, as it was inherently inseparable from its attribute. We found the doctrine to be essentially monarchical, and for that reason we declared it to be "inconsistent with the fundamental principles of the Republic." So, too, the English Government perceived the feudalism of the common-law rule to be inconsistent with the progress of the nation, and sought to have the law conform to principle. On the 21st day of May, 1868, a commission was appointed by the Queen to examine into the matter and report.

On February 20, 1869, the report of the commissioners was filed, wherein they recommended that the common law in respect to what constitutes a subject by birth be modified to the extent of permitting the child born within the kingdom to elect on arriving at his majority the citizenship of his parent. (See vol. 2, Foreign Relations of the United States, 1873–74, p. 1232.) From the majority report Sir W. Vernon Harcourt dissented, in an able opinion, and strongly advocated the adoption of the principle of international law (pp. 1243 *et seq.*). But it was too radical a departure from the common law, and because of that fact the majority of the commission was opposed to it, while they acquiesced in the irresistible logic of the dissenting opinion. They very likely

thought that a gradual change of the old rule would be more satisfactory, especially in view of the conservatism of the average Englishman and his reverence for the ancient dogmas of the common law.

On the 12th day of May, 1870, Parliament adopted the act entitled "An act to amend the law relating to the legal condition of aliens and British subjects" (see 33 Vict., chap. 14), and among other things recognized the right of expatriation and provided:

> Any person who, by reason of his having been born within the dominion of Her Majesty, is a natural-born subject, but who also at the time of birth became under the law of any foreign state a subject of such state, and is still such subject, may, if of full age and not under any disability, make a declaration of alienage in manner aforesaid, and from and after the making of such declaration of alienage such person shall cease to be a British subject.

This, of course, is very anomalous; it is impossible that a person be a subject of more than one State at a time. As said by Blackstone (book 1, chap. 10), "no man can owe two allegiances or serve two masters at once." Indeed, the allegiance to one country would neutralize that due the other, and thus there would be no allegiance to either; therein lies the nonsense of the theory of double allegiance—a theory that has long since been judicially rejected as being absurd and impossible. But it was a step in advance for the English people to even adopt the right of election and to thereby confer on the person born of alien parents the right to "make a declaration of alienage;" still it was a very lame effort to escape from

the antiquated notion of the common law, and doubtless will at an early date require an amendment that will be more in harmony with principle.

There are other nations that were by reason of peculiar circumstances compelled to adopt the anomalous doctrine of election, giving to the child on attaining majority the right to elect his nationality, between the country of his birth and the country of his father, and we apprehend this doctrine and its approval by some of our Attorneys-General and Secretaries of State arise from the very likely error of failing to distinguish between nationality and domicile. In *Udny* v. *Udny* (1 L. R., Scotch Appeals H. L., 457) the distinction is clearly stated by Lord Westbury.

He says:

> The law of England and of almost all civilized countries ascribes to each individual at his birth two distinct legal states or conditions—one, by virtue of which he becomes the subject of some particular country, binding him by the tie of natural allegiance, and which may be called his political *status;* another, by virtue of which he has ascribed to him the character of a citizen of some particular country, and as such is possessed of certain municipal rights and subject to certain obligations, which latter character is the civil *status* or condition of the individual and may be quite different from his political *status.* The political status may depend on different laws in different countries (he doubtless has reference to naturalization), whereas the civil *status* is governed universally by one single principle, namely, that of domicile, which is the criterion established by law for the purpose of determining civil *status*, for it is on

this basis that the personal rights of the party—that is to say, the law which determines his majority or minority, his marriage, succession, testacy, or intestacy—must depend.

International law depends on rules which, being in a great measure derived from the Roman law, are common to the jurisprudence of all civilized nations. It is a settled principle that no man shall be without a domicile, and to secure this result the law attributes to every individual as soon as he is born the domicile of his father if the child be legitimate, and the domicile of the mother if illegitimate. This has been called the domicile of origin and is involuntary. Other domiciles, including domicile by operation of law, as on marriage, are domiciles of choice. For as soon as an individual is *sui juris* it is competent to him to elect and assume another domicile, the continuance of which depends upon his will and act. * * * In adverting to Mr. Justice Story's work (Conflict of Laws) I am obliged to dissent from a conclusion stated in the last edition of that useful book, and which is thus expressed: "The result of the more recent English cases seems to be that for a change of national domicile there must be a definite and effectual change of nationality."

In support of this proposition the editor refers to some words which appear to have fallen from a noble and learned lord in addressing this House in the case of *Morehouse* v. *Lord*, 10 H. L. Cas., 272, when, in speaking of the acquisition of a French domicile, Lord *Kingsdown* says: "A man must intend to become a Frenchman instead of an Englishman." These words are likely to mislead, if they were intended to signify that for a change of domicile there must be a change of nationality—that is, of natural allegiance. That would be to confound *patria* and *domicilium*.

And in the same case the lord chancellor pertinently said:

> In questions of international law we should not depart from any settled decisions, nor lay down any doctrine inconsistent with them. I think some of the expressions used in former cases as to the intent "*exuere patriam*," or to become "a Frenchman instead of an Englishman," go beyond the question of domicile. The question of naturalization and allegiance is distinct from that of domicile.

True, for purposes of trade and within the jurisdiction of prize courts, domicile gives a national character (3 Phillimore on International Law, secs. 85, 725); but it is entirely distinct from the political *status*, and is merely that of domicile. (*The Indian Chief*, 5 Rob. Adm., 99.) Domicile of origin does not mean the place of birth, but refers to the domicile of the parent. (See 4 Phillimore on International Law, sec. 211 *et seq.*)

There is no doubt that in referring to the doctrine of election of citizenship between the place of birth and the country of the parent (the law creating the political *status*) the principle of international law governing the question of domicile, or, as the English judges term it, the question of citizenship was mistaken for the principle relating to nationality. And that accounts for the adoption of the doctrine of election by some of our Secretaries of State and Attorneys-General, and it seems to us that if they had adverted to the fact that by the Constitution the political *status* of citizenship is fixed at the *birth* of the child they would not have invoked the doctrine of election, for obviously there is no room for it. The

child when a citizen of the United States at birth continues to be a citizen until by *naturalization* in a foreign country he has expatriated himself.

We have now, in a general discussion, it is true, referred to the origin, the nature and province, and the modern modification in England of the common-law doctrine that birth within the *allegiance* of the King made the person a natural-born subject. We have pointed out the essentially monarchical and municipal nature of the doctrine, and in that connection we are reminded of the remarks of Mr. Justice Story in *Shanks* v. *Dupont* (3 Peters, 248), where he said:

> Political rights do not stand upon the mere doctrines of municipal law applicable to ordinary transactions, but stand upon the general principles of the law of nations.

We have referred to the principle of international law and found it to be fundamentally opposed to the feudal doctrine which constitutes the rule of the common law. We have pointed out the mistakes made and the misunderstanding arising from failing to distinguish between nationality and domicile; between *patria* and *domicilium*. We pointed out the inherent distinction existing between a citizen of a republic and the subject of a monarchy as bearing upon the proposition that in principle the law defining the one was necessarily in direct antagonism to the law defining the other.

It is evident then, that our position is, that the common law doctrine never applied to either the United States or the several States, for the manifest reason that it is an essential attribute of a monarchical form of gov-

ernment and therefore "inconsistent with the fundamental principles of the Republic." The judicial *ipse dixit* to be found in this country to the contrary, emanated from nisi prius courts of limited jurisdiction, and their rulings do not justify further notice. We now proceed to the argument of the question of citizenship, as affected by the Constitution, and as divorced from the untenable but prevalent theory, that the doctrine of the common law constitutes the law of the United States, to wit, that the place of birth and not the nationality of the parent determines the political *status* of the child.

National sovereignty is by the Constitution vested exclusively in the United States; therefore citizenship or the *status* of nationality appertains not to the several States, but to the sovereignty of the General Government.

> The United States is not only a government, but it is a National Government, and the only government in this country that has the character of nationality. (Per Mr. Justice Bradley in *Knox* v. *Lee*, 12 Wall., 457, 555; Chinese Exclusion Cases, 130 U. S., 604; *Nishimura Ekin* v. *United States*, 142 U. S., 651, 659; *In re Quarles*, 158 U. S., 535; *Cohens* v. *Virginia*, 6 Wheat., 264, 413.)
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> The United States are a sovereign and independent nation, and are vested by the Constitution with the entire control of international relations and with all the powers of government necessary to maintain that control and to make it effective. The only Government of this country which other nations recognize or treat with is the Government of the Union, and the only American flag known throughout the world is the flag of the United States. (*Fong Yue Ting* v. *United States*, 149 U. S., 711.)

> Both the States and the United States existed before the Constitution. The people through that instrument established a more perfect union by substituting a national government, acting with ample power directly upon the citizens, instead of the confederate government, which acted with powers greatly restricted only upon the States. (*Lane Co.* v. *Oregon*, 7 Wall., 71, 76.)

Citizenship, then, in its political and international signification, relates exclusively to the sovereignty of the United States, and is of the essence of that sovereignty. On reference, therefore, to the Constitution, we determine for whom the sovereignty was created and established. The Constitution in its preamble proclaims:

> *We the people of the United States*, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves *and our posterity*, do ordain and establish this Constitution for the United States of America.

It was ruled, and ruled correctly, in the case of *Dred Scott* v. *Sandford* (19 How., 404) that—

> The words "people of the United States" and "citizens" are synonymous terms and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. They are what we familiarly call the "sovereign people," and every citizen is one of this people and a constituent member of this sovereignty.

Again, at page 406, the court say:

> It is true every person, and every class and description of persons, who were at the time of the adoption of the Constitution recognized as citizens in the several States, became also citizens of this new political body, but none other. It was formed by them, and for them and their posterity, but for no one else. And the personal rights and privileges guaranteed to citizens of this new sovereignty were intended to embrace those only who were then members of the several State communities, or who should afterwards by birthright or otherwise become members, according to the provisions of the Constitution and the principles on which it was founded.

The Constitution gives to the nation exclusive power to naturalize aliens; so that, reading its provisions in respect to naturalization in connection with that portion of the preamble which declares that the Constitution is ordained and established for the then people of the United States and *their posterity*, the conclusion is irresistible that no person could be a citizen unless he was of that posterity or naturalized, or the offspring of a citizen. In other words, the nation was created *primarily* for those who constituted the people of the several States at the time of the adoption of the Constitution and their descendants; and provision was made for the admission of others to membership in the body politic by means of naturalization. That, of course, excluded the children of aliens, though born within the United States, and thus, in harmony with the principle of international law, the Constitution virtually defined the *status* of citizenship.

Such was the law at the time of the adoption of the fourteenth amendment, and the first section of that amendment defines citizenship in strict accord with what was then the law; so in that respect it is merely declaratory and not legislative in its nature. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." Only as citizens of the United States do they occupy the *status* of nationality; as citizens of the State their *status* is that of domicile. (2 Story on the Constitution, sec. 1693.) In the one case we have the political *status*, in the other we have the civil *status;* thus does the relation of the citizen to the State and the United States harmoniously respond to the dual nature of our governmental polity; and thus do we preserve the distinction between State and national sovereignty, and in a measure illustrate the difference between *patria* and *domicilium*.

The language of the Constitution is not that "all persons born in the United States are citizens," nor that "all persons born in the United States and subject to the jurisdiction of the laws thereof," nor that "all persons born within the allegiance of the United States" are citizens. Each one of these formulæ has at various times been used to express the definition of citizenship by birth, and each has been considered the equivalent of the definition of the Constitution, but they are all radical deviations from it in an essential respect. Indeed, none of them even express the common-law doctrine. As to the first, it was not true at common law that birth

on British soil made one a subject. In *Calvin's Case* it is said: "And it is to be observed that it is *nec coelum, nec solum*, neither the climate nor the soil, but *ligeantia* and *obedientia* that make the subject born."

As to the second, the common law never considered or referred to the "jurisdiction of the laws" in defining what constituted a natural-born subject.

> Allegiance being a quality of the mind, not circumscribed by space, due to the person of the King, inasmuch as his natural person can not be divided, the allegiance owing to him is inseparable and indivisible; it is not to be rendered severally in respect of one or other of his dominions. In a trial for high treason charged to have been committed just prior to the union of Scotland with this Kingdom, the doctrine thus deduced from *Calvin's Case* was on behalf of the accused strongly and ingeniously controverted. Can it be pretended, it was there asked, that the obedience due from the subject to the sovereign is an absolute blind obedience? Is it not rather such an obedience as the law of the particular Kingdom has prescribed?
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> If, then, this obedience is governed by the law of the place where it is due, it follows that where the laws differ the rule of obedience and subjection must differ, and consequently the allegiance due the King as King of England and the allegiance due to him as King of Scotland must, in respect of the difference of the laws of these nations, be separate and distinguishable. "Were it not so, the same act, if so in one, must in both kingdoms be the performance of the subject's allegiance; and the same act, if so in either, must in both kingdoms be the breach of it." Hence, it was argued in *Lindsay's Case* that there must be two allegiances—one owing to the King

as King of Scotland, the other owing to him as King of England; that a subject of the King in one regal capacity is not his subject in the other; that a subject of the King as King of Scotland is not a subject of the King as King of England. Reasoning such as this, if just and logical, might have led to consequences productive of perplexity or even of danger to the commonwealth.

A fallacy, however, is discoverable in it—allegiance is due from any one within the protection of the Crown, wherever, in what part soever of the dominions of the Crown he may chance to be, and that allegiance includes the obligation of obeying the laws which in such locality prevail. And hence it seems rightly argued in *Rex* v. *Johnson* that "There is great difference between the allegiance due to the King and the obedience due to the laws of any part of his dominions, of which the other parts of his dominions are independent." "Allegiance to the King of the United British Empire is as much due from a Scotchman as from an Englishman, but no obedience is due from a Scotchman resident in his native land to the laws of England." (Broom's Constitutional Law, 31.)

This doctrine results from the nature of allegiance to the King, it being to his person; and it is therefore clear that the "jurisdiction of the law" is not an element in the determination of what constitutes allegiance. Of course, when once allegiance exists then there arises *therefrom* the duty of the King to enforce the law for the protection of the subject, and the duty of the latter to obey the law. In respect to the United States, the jurisdiction of its law is in a great measure not anywhere near being coextensive with its sovereignty, and that arises from the

fact of the Government being one of enumerated powers. If, therefore, we were to make the jurisdiction of the law the criterion of citizenship by birth we would be inverting the natural order by substituting law, the creature of sovereignty, for sovereignty itself, and thus with us, in our form of government, we would be destroying the very essence of citizenship.

Then, again, if the "jurisdiction of the law" was adopted as the test, it would apply to aliens as well as it would to citizens; and if sufficient in the latter case, or rather if sufficient to make a person born on the soil a citizen, it ought with equal reason make a resident alien a citizen, unless we ascribe to the accident of birth on the soil some magic quality in the nature of a political metamorphosis. It certainly must be apparent that "jurisdiction of the laws" has no relevancy whatever in the determination of a question of citizenship. The Constitution says nothing of the laws' jurisdiction. It speaks of the jurisdiction of the United States—meaning, of course, the political jurisdiction, the jurisdiction of national sovereignty; not the incidental power to make and enforce laws, or the operation of those laws when made, but the jurisdiction over each member of the body politic by reason of his membership. All over the world, no matter where the citizen may be, that jurisdiction extends; whereas the jurisdiction of the laws is confined to the territory of the United States and operates only on those who are within its boundaries.

As to the third formula into which the definition of the Constitution has been transposed, to wit: "All per-

sons born within the allegiance of the United States are citizens," there was no such provision in the common law. There was no allegiance to Great Britain; it was due to the King in person as lord paramount. It was "a quality of the mind," and involved the offense of treason if the subject even imagined the death of the King, although there was no overt act whatever. In Hale's Pleas of the Crown, pages 115, 116, we are told that one Thomas Burdett, having a white buck in his park, which in his absence was killed by the King hunting there, "wished it, horns and all, in his belly that counseled the King to it; whereas in truth none counseled him to it, but he did it himself. For these words he was attainted of high treason and executed."

This is an apt illustration of allegiance as understood at common law.

> Allegiance is the mutual bond or obligation betwixt the master and the servant. *Item*, the mutual bond and obligation betwixt the King and his subjects, whereby we are called his lieges, because we are bound and obliged to obey and serve him. And he is called our liege King; because he should maintain and defend us. (Calvin's Case.)
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> As the ligatures or strings do knit together the joints of the body, so does allegiance join together the sovereign and all his subjects, *quasi uno ligamine*. (Calvin's Case.)
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> The legal significance of the expression "natural allegiance" appears from acts of Parliament, wherein the King is termed natural liege lord and his people natural liege subjects. (Calvin's Case.)

These quotations clearly indicate the nature of allegiance at common law, and prove it to be conclusively

and distinctly monarchical and feudal, and confined to the King and having no reference whatever to the nation. What an absurdity it would be to speak of the people of the United States as "liege subjects." And yet it would be quite proper to do so if there is such a thing as being born within the *allegiance* of the United States. The entire theory and fact of allegiance are essentially regal and utterly incompatible with a republican form of government. Allegiance was judicially described in *Countess of Shrewsbury's Case* (12 Rep., 97) as being "the best flower in the King's imperial garland." How, then, could it ever be supposed applicable to the sovereignty of a republic? There certainly is no such thing as birth within the *allegiance* of the United States, but there is such thing as birth within the *jurisdiction* of the United States.

"Subject to the jurisdiction thereof" is the language of the Constitution, and it is the most significant provision of the definition of citizenship there contained. Who are subject to the jurisdiction of the United States? Manifestly not those who are subject to the jurisdiction of any other nation, or who owe allegiance to any foreign prince, potentate, state, or sovereignty. Such is the contemporaneous exposition of the Constitution's definition by the very Congress that framed it, as is evidenced by what is now section 1992 of the Revised Statutes of the United States. It is there enacted: "All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States." Clearly, then, it was never intended

that children born in the United States of alien parents should be considered citizens.

Such children at the moment of birth would be subject to a "foreign power," to wit, the country of the parent, for it is a principle of international law, and recognized by the United States (sec. 1993, Rev. Stat. U. S.), that the children born abroad of citizens or subjects are citizens or subjects of the country of the parent. So, in respect to this case, it is the law of the Chinese Empire that the children of subjects when born abroad are subjects of the Emperor. Therefore, when Wong Kim Ark was born in San Francisco of Chinese parents there domiciled he at the moment of birth became a subject of the Emperor of China, and for that reason could not have been born "subject to the jurisdiction" of the United States. True, it appears from the record that his parents were *domiciled* in this country; but they were aliens, nevertheless, and Chinese subjects. (*Lem Moon Sing*, 158 U. S., 538, 547; *Fong Yue Ting*, 149 U. S., 724.)

The fact of domicile, therefore, did not make them citizens or operate to naturalize them; nor could it, since naturalization can only be had under an act of Congress. We are aware that Phillimore, in the first volume of his work on International Law, Chap. XVIII, page 347, in speaking of persons, or rather aliens, domiciled in a country, says: "They are *de facto* though not *de jure* citizens of the country of their domicile;" but however true that may be of a monarchy, it has no application to the United States. We have no *de facto* citizens. With us, either a person is a citizen *de jure* or he is necessarily an alien.

As the parents of Wong Kim Ark were, at the time of his birth, subjects of the Emperor of China, he was born in the *allegiance* and subject to the jurisdiction of a foreign power, and therefore could not be a citizen of the United States.

It is true, he was born in the United States; but he was not at the time of his birth, and certainly at no time afterwards, "subject to the jurisdiction thereof;" we mean, of course, the *political* jurisdiction of the nation; not the territorial jurisdiction, or which is the same thing, the jurisdiction, or more accurately, the operation of the laws. All the authorities agree that the provision of the Constitution's definition, "subject to the jurisdiction thereof," has reference to the political jurisdiction of the United States in its international relation of a sovereign nation, and not to the operation of the laws. In other words, the sovereignty of the United States is of a dual nature—internal and external. The jurisdiction of the law pertains to the former; and the political power of the nation to the latter. All persons born in the United States and subject to the *political* power thereof are citizens—natural born citizens; it follows that persons born in the United States of aliens are not citizens.

In the *Slaughter House Cases* (16 Wall., 73) Mr. Justice Miller, delivering the opinion of the court, said:

> The phrase "subject to the jurisdiction" was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States.

The learned judge of the district court in his opinion, which appears in the record here, asserts this to be *dictum;*

but we think he is mistaken. Nothing is *dictum* that is involved in the question presented for adjudication. What were the rights, privileges, and immunities of citizens of the United States, necessarily involved the determination of who are citizens; and therefore the decision in that respect is not *dictum*.

In passing we take occasion to reassert our position that the fourteenth amendment in its definition of citizenship is declaratory of the preexisting law, although stated in the opinion of Mr. Justice Miller that it "overturns" the *Dred Scott Case*. It seems to us that the *law* of that case is unexceptionable. Of course, the policy of the law, to the extent that it recognized slavery, was vicious in the extreme; but the judiciary has no concern with the policy of a law; that is a political and not a judicial question. It was rather the abolition of slavery and the emancipation of the negro, as the direct and immediate result of the civil war, that removed the abject and servile condition or *status* which necessitated the decision in the *Dred Scott Case*. When the fourteenth amendment was adopted the negro had already been vested with citizenship by virtue of the abolition of slavery and his emancipation. Conferring freedom upon him removed his incapacities and disabilities, and, having been born in the United States and not subject to any other sovereignty, he became a citizen immediately upon being emancipated.

We think, therefore, that it would be more accurate to say that the *status* of slavery which occasioned and made necessary the decision in the *Dred Scott Case* was abol-

ished, and not that the fourteenth amendment in defining citizenship overturned the decision. To proceed with the argument of the main question: In *Elk* v. *Wilkins* (112 U. S., 102), the court held that the provision "subject to the jurisdiction" of the United States, did not mean "merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their *political* jurisdiction."

Wharton, in his work on Conflict of Laws, at section 10, says:

> By the fourteenth amendment to the Constitution of the United States it is provided that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." If a child is born in the United States of French parents temporarily resident but not domiciled in the place of birth, is such a child a citizen of the United States by force of the amendment just stated? This depends upon the question whether the child at its birth is "subject to the jurisdiction of the United States."
>
> In one sense it undoubtedly is. All foreigners are bound to a local allegiance to the State in which they sojourn. Yet the term "subject to the jurisdiction," as above used, must be construed in the sense in which the term is used in international law as accepted in the United States as well as in Europe. And by this law the children born abroad of American citizens are regarded as citizens of the United States, with the right on reaching full age to elect one allegiance and repudiate the other, such election being final. The same conditions apply to children born of foreigners in the United States.

The proposition that the provision "subject to the jurisdiction" must be given the construction demanded by international law is undoubtedly correct. (See the opinion of the lord chancellor in *Udny* v. *Udny*, quoted in a preceding portion of this brief.) But the position taken by Mr. Wharton in respect to the existence of the right of *electing* nationality, is certainly at variance with the Constitution, as well as with international law. We have already discussed that point; but in view of the tendency heretofore manifested in some of our diplomatic correspondence to countenance the theory, we will here address attention to the fact that the Constitution fixes native citizenship *at the time of the person's birth.* (*Elk* v. *Wilkins*, 112 U. S., 94.) And the only possible method by which he can rid himself of the *status* thus impressed upon him is by naturalization, according to the laws of another nation. Certainly not by election; he can not even for a moment be a citizen of two nations; the repulsive absurdity of the monstrous doctrine of double allegiance is so forcibly apparent as to render wholly inexcusable any attempt in these times to invoke it.

As the political relation or *status* of citizenship is a unit and indivisible, and can only be changed by naturalization, there is no room for the doctrine of election; indeed the anomalous character of that doctrine primarily arises from attempts made to substitute for the feudal and monarchical theory of allegiance, prevailing at common law, the principle governing change of domicile, or what is called "domicile by choice," where the child on

arriving at majority may either retain his parent's domicile or elect to acquire a new one. All such attempts, while progressive steps toward the abrogation of rules such as that of the common law, are necessarily involved in a confusion of domicile and nationality, and are therefore to be rejected as being intolerably anomalous. Says Wharton:

> And by this law the children born abroad of American citizens are regarded as citizens of the United States, with the right, on reaching full age, to elect one allegiance and repudiate the other, such election being final.

It is difficult to understand how Mr. Wharton came to that conclusion, in view of the provisions of section 1993 of the Revised Statutes of the United States, and we dismiss the matter without further comment, other than to state that the principle of international law affixes the status of citizenship to such children, and does not recognize the doctrine of election. Turning to section 12 of the authority last cited, we find the law declared more in consonance with the true doctrine, but yet inaccurately. The author there says:

> By the fourteenth amendment to the Constitution of the United States, which has already been cited, "all persons born or naturalized in the United States, *and subject to the jurisdiction thereof*, are citizens of the United States and of the State wherein they reside." Are Chinese born in the United States citizens within the above clause? If the reasoning above given, to the effect that the children born in the United States of a foreigner are not internationally subject to the jurisdiction of the United

States, be correct, then Chinese born of Chinese nonnaturalized parents, such parents not being here domiciled, are not citizens of the United States.

The obvious objection to that statement of the law is that it makes *domicile* an element of nationality. The Constitution does not countenance any such theory, neither does international law; and why the children of an alien would be citizens if born in the United States while their parent had his domicile there, and aliens if born there while he had his domicile elsewhere, is inexplicable unless on the theory of Phillimore, referred to and commented upon by us in a preceding part of this brief, that those who are domiciled in a country "are *de facto*, though not *de jure*, citizens of the country of their domicile," a theory that is undoubtedly misleading and inherently unsound. An alien domiciled in the United States is just as much an alien as though he were merely within our territory *in transitu*. (*Fong Yue Ting* v. *United States*, 149 U. S., 724; *Lem Moon Sing* v. *United States*, 158 U. S., 538, 547.)

How is it possible to say that an alien, even if domiciled in the United States, is subject to the *political* jurisdiction thereof, or even "completely subject" to the civil jurisdiction thereof? Domicile fixes upon him a civil as contradistinguished from a political status—a point we have already discussed. But the jurisdiction of the several States is more comprehensive in its operation in fixing the rights and duties, capacities and incapacities, incidental to domicile than the jurisdiction of the laws of the United States; and clearly, as domicile places the alien

in a position where he is more subject to the jurisdiction of the States than the United States, it could not by any possibility be an element in the *status* of nationality of the offspring of the domiciled alien.

We may concede that the offspring from the time of birth would be subject to the jurisdiction of his father's domicile; yet that would not furnish the jurisdiction required by the Constitution as the basis of native citizenship; for, as held in *Elk* v. *Wilkins* (112 U. S., 94):

> The persons declared to be citizens are "all persons born or naturalized in the United States and subject to the jurisdiction thereof." The evident meaning of these last words is not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance.

As the political jurisdiction here referred to resides exclusively in the nation, it is evident that the jurisdiction of domicil, pertaining, as it does, mostly to the several States, cannot possibly be an element in determining the *status* of nationality, or national citizenship, even if we were to disregard the well-settled and natural distinction existing in international law between *patria* and *domicilium*. Now it occurs to us to suggest that perhaps Mr. Wharton made domicile an element in his definition of nationality, because of his views expressed in sections seven and eight of his work, above cited, wherein he advocates domicile as the test of civil *status*, and incidental rights, duties, and capacities, as against nationality which constitutes the test thereof, in what he terms "The new Italian school."

While his views in that respect are, in the main, undoubtedly correct, yet is it not likely that in sections ten and twelve he went to the extreme of considering domicile a test of the political as well as of the civil *status?* Others have done it—judges, writers on international law, Secretaries of State, and Attorneys-General of the United States. Is it not likely that Mr. Wharton fell into the same error? At all events, his position, virtually making domicile sufficient to confer citizenship, is clearly untenable. However, he is authority in support of the principal point of our argument, that the provision "subject to the jurisdiction" means the political jurisdiction of the United States, and not the civil jurisdiction thereof. Our illustration is this:

A citizen of the United States goes abroad and acquires a foreign domicile, in which place his child is born; now the child is in that case subject to the civil jurisdiction of the country of domicile, and so is his father; but, like his father, he is not subject to the *political* jurisdiction of the country of domicile, for he is a citizen of the United States from the moment of his birth. The same principle, of course, applies to children born in the United States of alien parents; they, too, are aliens, not being subject when born to the political jurisdiction thereof. Thus we see that both constitutional and international law concur in affixing to Wong Kim Ark the *status* of alien. But the learned judge of the district court thought it to be incumbent upon him to follow the ruling of Mr. Justice Field in the case of *Look Tin Sing*, where it was held that the provision "subject to the jurisdiction thereof"

meant the jurisdiction of the *laws* of the United States, and not its political jurisdiction. The question and ruling are thus stated by the district judge:

> Does it mean subject to the laws of the United States, comprehending in the expression the allegiance that aliens owe in a foreign country to obey its laws, or does it signify to be subject to the political jurisdiction of the United States in the sense that is contended for on the part of the Government? This question was ably and thoroughly discussed *In re* Look Tin Sing, where it was held that it meant subject to the laws of the United States.

Now, it is to be noted that a jurist of considerable reputation in this country and in England, the late Prof. John Norton Pomeroy, represented the Government in that case in conjunction with the district attorney, and advocated the same views we have here presented, or entertained the same views and held to the same conclusion; and it has always appeared to us that the ruling in the *Look Tin Sing Case* was rather an effort to avoid the consequences apprehended from the enforcement of the principle we are contending for than any attempt to question its soundness. And the learned judge of the district court seems to have been influenced by similar apprehensions. He says:

> The question is an important one, not alone from an abstract point of view, but because of the consequences a decision unfavorable to the petitioner would involve. For, if the contention of counsel for the Government be correct, it will inevitably result that thousands of persons of both sexes who have been heretofore considered as citizens of the United

States, and have always been treated as such, will be, to all intents and purposes, denationalized and remanded to a state of alienage. Included among these are thousands of voters who are exercising the right of suffrage as American citizens and whose right as such is not and never has been questioned, because birth within the country seems to have been recognized generally as conclusive upon the question of citizenzhip.

In other words, that because the error has become almost universal and our people through ignorance have established a course of conduct under the authority of what Lord Chief Justice Denman terms "law taken for granted," that therefore the law has been superseded and nullified. In the first place, time or practice will not sanctify error. In the second place, it is the cardinal duty of the judicial department to administer the law regardless of its consequences, leaving to the legislature the correction of evil results.

In the third place, the injury to our country arising from the admission to citizenship of every person born on the soil, irrespective of his parentage, would be far greater and extensively more disastrous than the consequences apprehended from an enforcement of the law to those (and they are not numerous) who would merely for a limited period be deprived of the adventitious, because collateral, right of suffrage or right to hold a public office. We say "a limited period," for if desirable as and qualified to be citizens, they may become such by naturalization; and in no other way can we avoid a virtual repudiation of the well-settled policy of our country as

manifested in its naturalization laws, wisely discriminating in the selection of such aliens as are to be deemed eligible to citizenship.

For the most persuasive reasons we have refused citizenship to Chinese subjects; and yet, as to their offspring, who are just as obnoxious, and to whom the same reasons for exclusion apply with equal force, we are told that we *must* accept them as fellow-citizens, and that, too, because of the mere accident of birth. There certainly should be some honor and dignity in American citizenship that would be sacred from the foul and corrupting taint of a debasing alienage. Are Chinese children born in this country to share with the descendants of the patriots of the American Revolution the exalted qualification of being eligible to the Presidency of the nation, conferred by the Constitution in recognition of the importance and dignity of citizenship by birth? If so, then verily there has been a most degenerate departure from the patriotic ideals of our forefathers; and surely in that case American citizenship is not worth having.

In conclusion, we feel that the prevailing ignorance relative to the law governing citizenship by birth is no excuse for the perpetuation of grievous and dangerous error; we feel that the variable, and at times empirical, views expressed by some of our public men in their diplomatic correspondence relative to the *status* of citizenship is to be greatly deprecated and can not be permitted to influence the decision of this case, the question presented being strictly judicial; we think it proper, however, to advert to the fact that when the first military draft

was proposed in August, 1862, Mr. Seward informed Mr. Stuart, then in charge of the British legation at Washington, that all foreign-born persons would be exempt who had not been naturalized, *or who were born in the United States of foreign parents.*

That was certainly a most solemn recognition at a time of great public necessity for the services of every person who could by any possibility be considered a citizen, of the principle for which we are contending, and which denies citizenship by birth to the children born in the United States of alien parents. It is said in the district court's opinion that—

> The doctrine of the law of nations, that the child follows the nationality of the parents and that citizenship does not depend upon mere accidental place of birth, is undoubtedly more logical, reasonable, and satisfactory. * * *

It may be that the Executive Departments of the Government are at liberty to follow this international rule in dealing with questions of citizenship which arise between this and other countries, but that fact does not establish the law for the courts in dealing with persons within our own territory. In this case the question to be determined is as to the political status and rights of Wong Kim Ark under the law in this country.

There lurks within that view a political heresy that can not be permitted to pass unnoticed. The Constitution is the supreme law of the land; it governs all the departments of government upon *all* questions, whether they be civil or political, national or international. In defining citizenship, its provisions are conclusive upon

Congress, upon the Executive, upon the judiciary, upon the States, upon the people of the United States, in the determination of all the questions arising relative to the political status, and on all issues pertaining to the same, whether they be of national or international origin. And finally the meaning of any specific portion of the Constitution is a *judicial question* and one to be authoritatively decided by the Supreme Court of the United States, whose decision is law, and binding upon each of the other departments of the Government and upon all who are subject to the supremacy of the Constitution. (1 Story on the Constitution, sec. 387.)

Therefore a citizen of the United States, when ascertained to be such in accordance with the definition of the Constitution, is a citizen for all purposes—national and international—and must be so recognized by all the departments of the Government whenever and wherever the question may arise in respect to his political *status*.

To revert to the *argumentum ab inconvenienti*, that has been urged against the application of what may correctly be termed the principle of nationality, the district court in its opinion states that—

> Counsel for the United States have argued with considerable force against the common law rule and its recognition as being illogical and likely to lead to perplexing and perhaps serious international conflicts if followed in all cases; but these observations are obviously addressed to the policy of the rule and not its interpretation.

Not so. They are addressed to the application of the rule; there is no dispute as to its interpretation. The pol-

icy of a rule often restricts its application, or at least defines it. It occurs to us, however, that the same objection the court urges against our position applies to the court's position in reference to "denationalizing" those who supposed that they were citizens and by common consent were so treated and allowed to exercise the right of suffrage; we may add, and hold public office. But, aside from that, the right of suffrage is not an incident of citizenship; it is a right or privilege entirely independent of and collateral to it, as was decided in *Minor* v. *Happersett* (21 Wall., 168).

Therefore the determination of the abstract question of citizenship can not possibly be influenced by considering the number of those who will no longer be entitled to vote if adjudged aliens; nor can it be influenced by considering the fact that such a judgment will result in ousting some persons who now hold public office. No election will be thus invalidated, for the voters in such cases were certainly voters *de facto*, and no official act will be open to attack, for the officials in such cases are officers *de facto*. So, where is there any ground for apprehension? The individuals affected may protect themselves and acquire citizenship, as we have already suggested, by becoming naturalized. We certainly insist that in any view of this case, or of the question involved, there is no merit whatever in the argument *ab inconvenienti*. And even if it were otherwise, the interests of the Government would be paramount. *Salus populi suprema lex*.

The entire subject of naturalization is exclusively under the control of Congress, and it would be an invasion of

its constitutional power in that respect to confer by judicial decree the status of native citizenship on the children born in this country of alien parents. There certainly is no conflict between the Constitution's definition of citizenship and its grant of power to Congress to "establish an uniform rule of naturalization;" but there would be a most decided conflict if the definition of citizenship by birth was construed to include the children of aliens. It is only by avoiding that conflict that we can logically escape the exceedingly anomalous and flagrantly inconsistent position of denying citizenship to a particular class of aliens and yet conferring the highest form of citizenship on their children, who stand in the same relation to the principle of exclusion as do their parents. The fact that such a result is possible ought of itself to be sufficient to condemn the doctrine invoked in support of the claim of Wong Kim Ark.

We respectfully submit that in law as well as in fact the respondent is an alien—a subject of the Emperor of China—and therefore not exempt from the provisions of the exclusion act. We further submit that this conclusion is not answered by setting up the doctrine that while he is a subject of the Chinese Emperor he is also a citizen of the United States and at majority had the right to elect between the two countries, as is the law now prevailing in England. (33 Vict., chap. 14.) Such double allegiance, to be terminated by election, is not possible under our Constitution. As held in *Elk* v. *Wilkins* (112 U. S., 94), to be a natural-born citizen the person at the time of his birth must not be "merely subject in some

respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction."

To hold that Wong Kim Ark is a natural-born citizen within the ruling now quoted, is to ignore the fact that at his birth he became a subject of China by reason of the allegiance of his parents to the Chinese Emperor. That fact is not open to controversy, for the law of China demonstrates its existence. He was therefore born subject to a foreign power; and although born subject to the laws of the United States, in the sense of being entitled to and receiving protection while within the territorial limits of the nation—*a right of all aliens*—yet he was not born subject to the "political jurisdiction" thereof, and for that reason is not a citizen. The judgment and order appealed from should be reversed, and the respondent remanded to the custody of the collector.

Respectfully submitted.

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